No. 16096

In the United States Court of Appeals for the Ninth Circuit

JOSEPH F. BLAYLOCK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ORLEANS VENEER AND LUMBER CO., A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

PERRY W. MORTON,
Assistant Attorney General,
ROBERT H. SCHNACKE,
United States Attorney,
San Francisco 1, California.
BERNARD PETRIE,
Assistant United States Attorney,
San Francisco 1, California.
ROGER P. MARQUIS,
CLARON C. SPENCER,
Attorneys, Department of Justice,
Washington 25, D.C.

INDEX

CITATIONS

Cases:

509561—59——1

In the United States Court of Appeals for the Ninth Circuit

No. 16096

JOSEPH F. BLAYLOCK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

ORLEANS VENEER AND LUMBER CO., A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The memorandum opinion of the district court (R. 33–39) is reported at 159 F. Supp. 874. The findings of fact and conclusions of law appear in the record at pages 39–45.

JURISDICTION

This is an appeal from a judgment of the district court entered March 28, 1958 (R. 46–48). Notice of appeal was filed by appellants Joseph F. Blaylock and Orleans Veneer and Lumber Co. on May 19 and May 27, 1958, respectively (R. 48, 50–51). The jurisdiction

of the district court over this suit by the United States rested on 28 U.S.C. sec. 1345. The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the State of California did or could tax and sell a tract of land in a national forest rather than a homestead on adjoining land the patent to which had mistakenly used a description of the national forest tract, and, if so,

2. Whether a timber company buying the timber from the forest tract was a bona fide purchaser without notice of the right of the United States to correct the mistake.

STATEMENT

This action was instituted by the United States to obtain a permanent injunction against the cutting of timber by appellant Blaylock from a tract of forest land lying within the Klamath National Forest. In addition to the injunctive relief, the United States sought additional relief in the nature of a deed of the forest tract from appellant Blaylock, a judgment declaring that the forest tract belongs to the United States free of any liens including the asserted interest of appellant Orleans Veneer and Lumber Co. (hereafter "Orleans") and also reformation of patent No. 822, 606 (Pl. Ex. No. 1; Tr. 4–5) to describe the land homesteaded by the patentee. The relevant facts are as follows:

The patent was issued September 13, 1921, to John Patterson, who resided with his family upon land homesteaded within the Klamath National Forest (R. 55–57). The patent contained the following description of the land patented:

> Northeast quarter of the northwest quarter, the east half of the east half of the northwest quarter of the northwest quarter, the north half of the north half of the southeast quarter of the northwest quarter and the northeast quarter of the northeast quarter of the southwest quarter of the northwest quarter of Section thirty-four in Township thirteen north of Range six east of the Humboldt Meridian, California, containing sixty-two and fifty-hundredths acres.

Property taxes assessed for the year 1937 were not paid by Patterson and in 1943 a Conveyance of Real Estate was issued by the Siskiyou County tax collector to the State of California describing the land taxed as follows (Pl. Ex. No. 2; Tr. 5):

> HOMESTEAD ENTRY #02655 IN NW¼-DESIG. PLAT #4 SEC 34 TWP 13 R. 6E HM DITCH AND WATER RIGHT.

In 1946 Hyrum Sims, who lived in the vicinity, after first inspecting the Patterson homestead, requested that it be put up for sale at public auction and, as the successful bidder, obtained a tax deed describing the land sold as follows (Pl. Ex. No. 3; Tr. 6):

> H.E. #02665 Por. of NW¼ (Ditch & Water Right) Section 34, Twp. 13 North, Range 6 East HM.

Sims moved on to the homestead in 1951 and had it surveyed the following year by the county surveyor. The homestead was marked on the southeast corner by a blazed Madrone tree, but the survey showed the homestead to be in sections 27 and 28, instead of in

section 34 as indicated by the tax deed which Sims had received from the State of California (Tr. 18–20, R. 60). Upon learning that the homestead did not lie in section 34 as stated in his tax deed, Sims wrote the following in a letter to the Supervisor of the Klamath National Forest dated March 19, 1952 (Pl. Ex. No. 11–D, Tr. 50–52):

> About five years ago I obtained a parcel of land amounting to 62½ acres in the Klamath forest. This was through a tax sale by Siskiyou County. The land was advertised according to law, and sold to me as the highest bidder. Since then I have resided continually on same and have made my home there. This land was homesteaded by John Patterson in 1921 and lies in Section 34, Township 13N–R 6 E, Siskiyou County. Legal description as follows:
>
> NE ¼ NW ¼–E ½ E ½ NW ¼ NW ¼–NE ¼ NE ¼ SW ¼ NW ¼–N ½ N ½ SE ¼ NW ¼–R6–E HM 65–50 Acres List 5–2436 Serial 02655.
>
> The buildings have been on the place approximately forty years and the corner marked by the forest service is clearly shown on a map prepared by A. F. Parrott, Siskiyou County official surveyor. I have spent quite a lot of money on a road to the place and rebuilding.
>
> Last week I called Mr. Parrott to come down and survey this ground and mark all four corners. He ran a line from an established section line corner on the Klamath River road to my property and found that there was an approximate two thousand foot discrepancy in the locations. The place where I am living is in Section 27 and 28, and the land described

legally as mine is in Section 34 an unimproved, untouched piece of heavily timbered land.

The land I thought I owned has all my buildings on it and a large meadow, access road, fences, etc. What I want to do is to make an exchange so a new legal description will fit my ground.

For information and a complete clear map of the situation, contact Mr. A. Parrott, Siskiyou County Surveyor.

Please advise me as soon as possible as to the procedure to pursue from this point on. I have contacted the Land Management Office here and they referred me to you as the necessary first step in this matter. This is an urgent matter, and if you can expedite it in any way, I would be very grateful.

In response to his letter Mr. Sims received the following reply, dated March 27, 1952, from the Forest Service (Pl. Ex. No. 11–C, Tr. 52–54):

We have consulted with Mr. Parrott on the mislocation of your lands. In comparing Mr. Parrott's maps and the original Homestead report, it is apparent that the description of your land is in error or that the original township survey of 13 N., R. 6 E., is very irregular.

If the original description of your lands is in error, we will be pleased to recommend that you be given an adjusted homestead patent describing the correct area that was originally intended by both the Forest Service and the original locator to be patented.

Before making such a recommendation we are seeking the advice of our regional engineer, as the only known corner of which we

have a record is the re-established corner from which Mr. Parrott ran his survey, and is 1½ miles distant from your lands. The original land survey in this section of the country has been found to be very irregular and it might be possible that there is a corner closer to your lands that might describe your lands differently than the corner 1½ miles distant from which Mr. Parrott's survey originated. If such is the case, and we recommend an erroneous description for a patent adjustment, we might do you more harm than good.

We are asking our regional engineer to advise us on the best procedure for accurately describing your lands as they exist on the ground. It may be that he will recommend a further survey by Mr. Parrott so that you may be assured of the correct description of your lands. However, you may be assured that we will assist you in every way to secure an adjusted patent that will accurately describe your lands.

After a meeting between Mr. Sims and the Forest Service Supervisor, the latter wrote Sims another letter, dated July 23, 1952, which was in part as follows (Pl. Ex. 11–B, Tr. 56):

To further clarify your understanding of our letter and conversation, the following is the situation that exists:

1. We recognize your right to the 62½ acre tract now occupied and marked by the property corner you described. You can go ahead with the development of the 62½ acre tract even though the description is in error. This includes cutting of the timber.

2. We would be willing to accept an amended patent description covering the 62½ acres when a resurvey is made.

Sims had the timber standing upon the homestead logged in 1953, 1955, and 1956. One of those who logged the timber in 1955 and 1956 was appellant Blaylock (Tr. 59–60).

On June 25, 1956, a quiet title action was brought in behalf of Sims by counsel for appellant Blaylock against the administratrix of the estate of John Patterson, deceased, and a judgment was obtained quieting title to the forest tract to Sims according to its legal description as contained in the homestead patent. The judgment entered July 2, 1956, recited that Sims had been in actual exclusive and adverse possession of that tract but Sims later testified in this proceeding that he had never resided upon the forest tract (R. 63–64). The United States was not named as an interested party in that action nor was the State (Pl. Exs. Nos. 4, 5; Tr. 7).

Within a week, on July 9, 1956, Sims gave Blaylock both a quitclaim deed describing the homestead by metes and bounds and a grant deed describing the forest tract according to the legal description contained in the homestead patent (Pl. Exs. Nos. 6, 7; Tr. 7, 8). A copy of the homestead patent was recorded on July 10, 1956 (Pl. Ex. No. 1). Thereafter, appellant Blaylock executed a document assigning all his right, title and interest in the grant deed from Sims to appellant Orleans Veneer and Lumber Co. as security for the performance of an agreement whereby Blaylock re-

509561—59——2

ceived $9,000.00 for the timber in the forest tract (R. 31–32, 67–69, Pl. Ex. No. 8).

The case was tried before the district court without a jury and judgment was entered for the United States (R. 46–48). In a memorandum opinion filed March 4, 1958, the district court concluded that through mistake the patent issued to Patterson, the homestead entryman, described the forest tract instead of the homestead intended to have been patented, that Sims had intended to buy the homestead from the State of California and that the United States has a right to reformation of the patent and other documents of title involved. In answer to appellant Blaylock's defense that he had purchased the forest tract from Sims in good faith, for value and without notice of the Government's interest in the land, the district court pointed out that Blaylock had known of the arrangement with the Forest Service whereby Sims had been permitted to log the homestead, that Sims had given Blaylock a copy of the county surveyor's map showing the locations of both the homestead and the forest tracts, that Sims had told Blaylock that the latter would not have any right to the timber on the forest tract, and that, therefore, Blaylock was not a bona fide purchaser (R. 36–37, 61–62; Tr. 67–69, 78, 85).

In answer to Blaylock's defense that the State of California and Sims were bona fide purchasers of the forest tract and thereby had cut off the Government's rights of reformation, the district court said that because the United States as the real owner had always been in possession of the land and had a right as

against the homestead entryman to reformation of the patent, the forest tract was not within the state's jurisdiction to tax (R. 37).

The district court also held that laches was not available against the United States in enforcing its right in property held in trust for the people, and that Orleans Veneer and Lumber Co. could acquire no rights in the forest tract superior to those of the United States because the origin of the company's claim is a tax deed defective for want of taxing jurisdiction (R. 37–38). This appeal followed.

SUMMARY OF ARGUMENT

I

A. Since the source of Sims' title, through whom appellants claim their interests in the forest tract, is the tax deed, Sims could convey an interest only in the land actually taxed and sold to him. The entryman and his family resided upon the homestead tract and this land was subject to taxation by virtue of the fact that the entryman had earned equitable title thereto and was described in the tax records as a homestead entry. The forest tract, however, was unimproved and unoccupied and the fact that it was described in the patent issued by the United States was not learned until after Sims obtained his tax deed from the state. The land taxed and sold to Sims must, therefore, have been the homestead.

B. Until all conditions have been met upon which the right to a patent depends, the United States retains the equitable title to the land. The issuance of a patent which mistakenly describes land not intended

to be patented and for which the conditions of a patent have not been met does not deprive the United States of its equitable title to the land. The United States retains such an interest in the land, therefore, as to make its taxation by the state void.

II

Orleans Veneer and Lumber Co. must be charged with notice of the Government's interests in the forest tract since the tract was within the national forest, the record showed that the source of title was a homestead patent and any physical observation of the land would show it could not have been a homestead.

ARGUMENT

I

THE STATE OF CALIFORNIA DID NOT AND COULD NOT TAX THE NATIONAL FOREST TRACT

A. *The tax records and the tax deed related to the homestead and not the national forest tract:* Sims gave to Blaylock two deeds, one to the homestead and the second to the forest tract, each purporting to convey Sims' interest in the tract. Since the source of Sims' interest in either tract is the tax deed from the State of California, he could obviously pass an interest to Blaylock in only one of the two tracts.

The homestead with its buildings, meadow, and orchard was the residence of the Patterson family (R. 56–58, 83–84). This land was subject to taxation by the state, for once Patterson had resided upon the land, improved it and otherwise complied with the laws under which the patent was subsequently issued

to him, the United States no longer had any real interest in the land. Patterson had become the "beneficial owner" of his homestead. He held the equitable title to the land and there existed no bar to its taxation. *Carroll* v. *Safford,* 3 How. 441 (1844); *Van Brocklin* v. *State of Tennessee,* 117 U.S. 151, 169 (1886); *Wisconsin Railroad Co.* v. *Price County,* 133 U.S. 496, 505 (1890); *Bothwell* v. *Bingham County,* 237 U.S. 642, 647 (1915); *Miller* v. *Imperial Water Co. No. 8,* 156 Cal. 27, 30, 103 Pac. 227, 229 (1909). By relation back to the inception of the equitable title the patent, once it issues, completes the title obtained at a tax sale. *Hussman* v. *Durham,* 165 U.S. 144, 148 (1897).

The homestead was thus liable to local taxation. The tax deed from the county to the state shows that that is what was taxed. It expressly refers to "Homestead Entry #02655". In fact, the deed does not describe by metes and bounds sectional description or otherwise a tract of land so that it can be located on the ground. Instead, simply as identification, it refers to the homestead entry. "IN [i.e. within] NW ¼ DESIG. PLAT #4 SEC. 34 TWP 13 R. 6E HM DITCH AND WATER RIGHT". It is thus impossible from the deed by itself to tell what land is conveyed. A purchaser would have to either look at the land and find a homestead with a ditch in Section 34 (and there is none) or look to the federal land records. Those records would show a homestead entry of Patterson who mistakenly believed he was in section 34. Plainly it was the Patterson homestead

which the county purported to deed to the state for taxes.

It is equally clear that it was the Patterson homestead which the state purported to sell to Sims. The same description, in briefer form, was used. The deed said "H.E. #02665 Por. [Portion] of NW ¼ (Ditch & Water Right) Section 34, Twp. 13 North, Range 6 East HM." And the fact is that Sims, who had requested that the land be sold for taxes, inspected the homestead and made it his home after receiving the tax deed (R. 58–59). It is only by reference to the homestead entry that a description sufficient to make the deed valid can be found.

The forest tract, according to Sims' description of it in his letter to the Forest Service, is "an unimproved, untouched piece of heavily timbered land," *supra,* p. 5 (Pl. Ex. No. 11–D). Witness Young, who cruised the timber on this land for Orleans Veneer and Lumber Co., said that there were no buildings or other improvements upon it and that it bears no evidence of cultivation (R. 85). There is nothing to indicate that this land was ever occupied or that it was ever considered to be anything but a part of the Klamath National Forest. Thus, the tax deeds did not specify what part or portion of the NW ¼ of section 34 was conveyed. Neither the taxing officials nor grantees could find a homestead in section 34. Plainly they did not intend to deal in any way with the national forest rather than the homestead. Reformation to correctly describe the location of the homestead could have been attained by Patterson, had he known of the error, and such relief was

properly awarded to the United States. R.S. 2372, as amended by the Act of February 24, 1909, 35 Stat. 645, 43 U.S.C. sec 697; 43 CFR 104; *Le Marchal* v. *Tegarden,* 175 Fed. 682 (C.A. 8, 1909). Reformation of the patent to describe the land intended to have been patented was available to the United States, *United States* v. *Hudson,* 269 Fed. 379 (C.A. 8, 1920), for "it cannot be doubted that inadvertence and mistake are * * * grounds for judicial interference to divest a title acquired thereby. This is equally true, in transactions between individuals, and in those between the government and its patentee. If, through inadvertence and mistake, a wrong description is placed in a deed by an individual, and property not intended to be conveyed is conveyed, can there be any doubt of the jurisdiction of a court of equity to interfere and restore to the party the title which he never intended to convey?" *Williams* v. *United States,* 138 U.S. 514, 517 (1891).

There is no room here for a defense to such reformation of bona fide purchase. Having purchased the homestead from the State of California, Sims had no title or interest in the forest tract which he could convey to appellant Blaylock. His purported deed therefore was void for want of a title in Sims. Although for reasons stated, *infra,* pp. 18–21, Orleans Veneer and Lumber Co. must be charged with notice of the Government's rights in the timber tract, nevertheless, assuming the company had no notice of those rights, its claim to the forest tract must fail, since an instrument wholly void cannot be made the foundation of a good title even under the equitable doctrine of bona

fide purchase. The mere fact that an encumbrancer acted in good faith in dealing with one who apparently held the legal title is not in itself a sufficient basis for relief. *Bryce* v. *O'Brien,* 5 Cal. 2d 615, 616, 55 P. 2d 488, 489 (1936); *Trout* v. *Taylor,* 220 Cal. 652, 656, 32 P. 2d 968, 970 (1934); *Bernhard* v. *Wall,* 184 Cal. 612, 625, 194 Pac. 1040, 1046 (1921). As stated in *Trout* v. *Taylor,* at p. 657, the loss resulting must fall where the course of business has placed it. The company's recourse, if any, is against Blaylock who took the deed from Sims with knowledge of the Government's interest in the forest tract. Put otherwise, bona fide purchase cuts off equities but does not create legal title. The only federal land patented, the only land taxed and sold for taxes, was the homestead, which was erroneously described as being located in part of the NW ¼ of section 34.

B. *Even if the state and county had purported to tax and sell the land embraced in the legal description of Patterson's patent, the result would have been the same:* For purposes of this case it has been assumed that a survey according to the legal description in Patterson's homestead patent would apply to the tract of national forest lands appellants seek to log.[1] The local authorities could not have taxed such land because lands owned by the United States are not

[1] While there have been unofficial surveys, an official Government public lands resurvey has never been made to determine how to correct the errors (*supra*, p. 7). The district court avoided this difficulty by using a metes and bounds description of the homestead. Of course, so long as the land remains in the national forest there is no pressing need for a resurvey.

subject to state taxation. This is so, because the power vested in Congress by the Constitution "to dispose of * * * property belonging to the United States," Art. IV, Sec. 3, "implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise." *Wisconsin Railroad Co.* v. *Price County,* 133 U.S. 496, 504 (1890); *United States* v. *Allegheny County,* 322 U.S. 174 (1944). As the *Wisconsin Railroad Co.* case shows (p. 505) the question of taxability of land within the purview of the public land laws does not depend upon legal title to the land, but upon the existence or absence, as the case may be, of any beneficial interest in the land on the part of the United States. Thus, as shown *supra,* p. 10–11, once equitable title has been earned by the entryman his land is subject to taxation. But until all conditions have been met upon which the right to a patent depends, the United States retains the equitable title to the land and therefore has such an interest in the land as to make its taxation void. *Irwin* v. *Wright,* 258 U.S. 219 (1922); *Sargent* v. *Herrick,* 221 U.S. 404 (1911); *Hussman* v. *Durham,* 165 U.S. 144 (1897). "The reason for the rule against state taxation until the equitable title passes from the United States to the entryman" is "placed upon the policy of the Government to require those who sought government land to perform the required conditions of residence or improvement before beneficial title, subject to state taxation, passes from the United States to the locator." *S.R.A., Inc.* v. *Minnesota,* 327 U.S. 558, 568 (1946).

In *Hussman* v. *Durham, supra,* a formal certificate of location was issued in 1858 to one Craig by the Department of the Interior for land located in that year under a bounty warrant. The records of the department showed on their face a full equitable title passing to Craig. In 1888 the requisite payment to the United States was made by Durham who had obtained conveyances from Craig and a patent issued the following year to Craig, his heirs and assigns. Durham then commenced suit to quiet his title as against the defendant Hussman holding the tax title. The Supreme Court said that the validity of the tax title held by Hussman depended upon the question whether the equitable title had passed from the Government to Craig. Since payment was not made until after the land had been sold for taxes, the tax sale and tax deed were void because the Government retained the equitable title even though its records showed the passing of full equitable title to Craig. The title by relation, upon the issuance of the patent, dated only as of the inception of the equitable title with the payment made in 1888 and therefore nothing passed by the state's tax deed.

In this present case nothing has been done in compliance with the public land laws towards the acquisition of the forest tract. The issuance of the patent to Patterson, the homestead entryman, with the erroneous description of the homestead to which he had earned equitable title did not deprive him of that title, nor did it deprive the United States of its equitable title to the forest tract actually described in the patent even assuming that bare legal title to the forest

tract did pass. As we have said, Patterson could have obtained a correction of his patent to properly describe his homestead if he had known of the error and the United States could now do likewise.

There is no merit to appellant Blaylock's assertion (Br. 4–6) that the State of California and Sims were bona fide purchasers of the forest tract and thereby cut off the Government's right to reformation of the patent. In the first place, as we have pointed out (*supra,* p. 10–13), the state's deed conveyed a homestead, not the forest tract. Secondly, the conveyance of property to the state by the county tax collector "is not a sale but is merely a book transaction to facilitate the adjustment of accounts between the tax collector and the auditor," *Weber* v. *Wells,* 154 F. 2d 1004, 1005 (C.A. 9, 1946), or, in other words, a sale "by operation of law and the declaration of the Tax Collector." *Stockton Harbor Indus. Co.* v. *Commissioner of Int. Rev.,* 216 F. 2d 638, 649 (C.A. 9, 1954), cert. den. 349 U.S. 904. The purpose of the sale is not the acquisition of property but the collection of taxes. *Angelo Cal. Nat. Bank* v. *Leland,* 9 Cal. 2d 347, 353, 70 P. 2d 937, 939–940 (1937); *People* v. *Maxfield,* 30 Cal. 2d 485, 487, 183 P. 2d 897, 898 (1947). Thirdly, so long as the United States retained the equitable title in the forest tract as against Patterson, the land was exempt from taxation. The state could neither obtain for itself, nor pass to its grantee Sims, a title derived from a tax proceeding void for lack of jurisdiction over the property. *Gaspard* v. *Edward M. LeBaron, Inc.,* 107 Cal. App. 2d 356, 360, 237 P. 2d 278, 280 (1951); *Sheeter* v. *Lifur,* 113 Cal. App. 2d

729, 738–739, 249 P. 2d 336, 342 (1952). While it is not important here, it seems clear that a subsequent bona fide purchase could not confer tax jurisdiction nor validate the void deed.

Patterson, the homestead entryman, sold the homestead to no one. Prior to the tax sale there was none to claim the equitable protection of a bona fide purchaser. The United States was, therefore, as stated by the district court, the real owner of the national forest at the time of taxation (R. 37). As holder of the equitable title to the forest tract the United States retained such an interest in the land as to make its taxation by the State of California void.

II

THE ORLEANS VENEER AND LUMBER CO. IS NOT A BONA FIDE MORTGAGEE

Appellant Orleans claims under the equitable doctrine of bona fide purchase to have relied on the record without notice of any equitable claim of the United States. This contention fails for the first reason, which we have given, that Blaylock had no interest which could be encumbered. Moreover, the facts show that Orleans had both legal and actual notice of the title of the United States.

The record chain of title on which Orleans relies showed, in the two tax deeds as well as the patent, that a homestead, together with a ditch and water rights, was involved. Certainly all persons dealing with former public domain are charged with notice that the federal homestead requirements include residence and cultivation, which necessarily means a

house, a clearing of some size in the forest, other appropriate improvements, and means of access. Likewise, all persons are, of course, charged with knowledge of facts which appear from physical observation of the land in question. Mr. Young, for the company, said he visited the tract prior to execution of the contract and that he saw timber on it but saw "no buildings," no "improvements of any kind," no "evidence or [sic of] cultivation" (R. 85). The absence of any sign of present or former habitation, we submit, by itself puts any purchaser, charged with knowledge that he is buying a supposed homestead, on notice that the property is still owned by the United States, especially when it contains a valuable stand of timber within the exterior boundaries of a national forest.

Indeed, the fact is that Mr. Young, for the company, had actual knowledge that this was supposed to be the Patterson homestead (R. 83–84). The closest this witness came, on direct examination, to asserting that he had no idea the land was still national forest land was that he did not know of any misdescription, that "I was told to find Section 34 and the property described therein and I did" (R. 81). This was the only witness offered by the company who had examined the land. This evidence falls far short of sustaining the burden resting upon Orleans.

"The absence of notice is an essential requirement in order that one may be regarded as a bona fide purchaser." *Basch* v. *Tide Water Etc. Co.,* 49 Cal. App. 2d 743, 746, 121 P. 2d 545, 546 (1942); *Kenniff* v. *Caulfield,* 140 Cal. 34, 45, 73 Pac. 803, 806 (1903);

Eversden v. *Mayhew,* 65 Cal. 163, 167, 3 Pac. 641, 644 (1884). The burden of proof in this respect rests upon the party who claims the benefit of the protection afforded a bona fide purchaser to prove lack of notice if none existed. *James* v. *James,* 80 Cal. App. 185, 195, 251 Pac. 666, 670 (1926); *Fitzgerald* v. *Terminal Development Co.,* 11 Cal. App. 2d 126, 133, 53 P. 2d 177, 180 (1936). What constitutes notice depends of course upon the facts of the particular case but it is equally true, as stated in *Barthelmess* v. *Cavalier,* 2 Cal. App. 2d 477, 488, 38 P. 2d 484, 490 (1934), that:

> The existence of facts calculated to put a reasonable person upon inquiry, coupled with a duty to inquire will, if not pursued, deprive a person of his position as a *bona fide* purchaser. And inquiry becomes a duty when the facts are inconsistent with a perfect right in him who proposes to sell. It also exists where the facts of which the purchaser should be aware are calculated to awaken suspicion. Of necessity, no definite rule can be formulated as to what, in a particular instance, is sufficient to arouse suspicion. But the better rule is that

> information even as to collateral facts which if pursued would have led to the discovery of the ultimate facts is sufficient to charge the person failing to pursue.

Any possible weight of the direct examination of the witness Young is destroyed by cross-examination where he said that he knew he was looking for a homestead and that he saw no evidence of occupation or cultivation. No attempt was made by redirect examination to explain away these admissions, which are fatal to the claim of bona fide purchase. The company apparently relied upon a title insurance policy issued to Blaylock (Orleans' Brief, p. 8). "A title opinion cannot be sufficient to satisfy a duty to inquire as to possible equitable interest any more than it can without inquiry as to rights of parties in possession." *Webster* v. *Knop,* 6 Utah 2d 273, 278, 312 P. 2d 557, 560–561 (1957). Nor can the reliance upon a title insurance policy relieve Orleans Veneer and Lumber Co. of the duty to make further inquiry in this instance. Certainly title insurance cannot operate to destroy rights of third parties, the possible existence of which is the reason for the insurance.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court was correct and should be affirmed.

Respectfully,

PERRY W. MORTON,
Assistant Attorney General.
ROBERT H. SCHNACKE,
United States Attorney,
San Francisco 1, California.
BERNARD PETRIE,
Assistant United States Attorney,
San Francisco 1, California.

ROGER P. MARQUIS,
CLARON C. SPENCER,
Attorneys, Department of Justice,
Washington 25, D.C.

JUNE 1959.

U. S. GOVERNMENT PRINTING OFFICE: 1959